COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
APPEAL NO. 2014-SC-000394-D

GARY MARTIN, BOBBY MOTLEY, AND

MIKE SAPP
APPELLANTS

vs.

STEPHEN O'DANIEL
APPELLEE

** ** ** ** **

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS
2012-CA-001961
APPEAL FROM THE FRANKLIN CIRCUIT COURT
SUMMARY JUDGMENT
HONORABLE SHEILA R. ISAAC, SPECIAL JUDGE
NO. 07-CI-00820
** ** ** ** **

** ** ** ** **

BRIEF FOR APPELLANT, BOBBY MOTLEY

** ** ** ** **

CERTIFICATE OF SERVICE

I hereby certify that on May 22 2015, a true and correct copy of the Appellant, Bobby Motley's Brief was served via first-class mail, postage prepaid, on the following: Hon. Shelia Isaac, Special Judge, Franklin Circuit Court, P.O. Box 678, Frankfort, KY, 40602-0678, Hon. Thomas E. Clay, 462 South 4th Street, Suite 101, Louisville, KY 40202, L. Scott Miller, 919 Versailles Rd, Frankfort, Kentucky 40601, William E. Johnson, 326 W. Main Street, Frankfort, Kentucky 40601.

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STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

Appellant, Bobby Motley, pursuant to CR 76.20, respectfully moves the Court to reverse the Opinion of the Court of Appeals entered June 13, 2014, and affirm the Franklin Circuit Court's October 19, 2012, grant of appellant's motion for summary judgment on grounds of the Appellee's failure to prove the first element of malicious prosecution and further, in light of the recent decision of the United States Supreme Court in Rehberg v. Paulk, 132 S.Ct. 1497, 182 L.Ed. 2d 593(2012), appellant is also entitled to official absolute immunity. (A copy of the Opinion and Order of the Court of Appeals and Order of the Franklin Circuit Court Granting Motion For Summary Judgment are attached)

STATEMENT CONCERNING ORAL ARGUMENT

This Appellant respectfully requests oral argument as it may be helpful due to the lengthy and convoluted history of the case.

STATEMENT OF THE CASE

Appellant Bobby Motley asserts the underlying facts are undisputed and sets forth the following statement of facts and procedural history.

UNDISPUTED FACTS

The appellee, unknowingly, purchased a stolen car in March of 2006. After purchase appellee discovered that parts on the car were for a 1975 model Corvette rather than a 1974 model. He

took the car to Detective Bill Riley, a recognized Kentucky State Police expert on stolen cars. Detective Riley found the vehicle identification number ("VIN") was glued on and was not the manufacturer's VIN. Detective Riley also found the car had been stolen in 1981 and that the insurer, State Farm Insurance Company ("State Farm") had paid the owner under a theft insurance policy. When Riley discovered that the car was a stolen car the Kentucky State Police were required to impound the car pursuant to KRS 16.200(3) and 186A.320. Detective Riley advised appellee that if a lawful owner of the car could not be found that the car would be forfeited and possibly crushed. KRS 186A.320(3) and 500.090 so provide. Throughout this litigation Riley's statement that the car "would be crushed" has been advanced by appellee's counsel as showing some personal prejudice against appellee. Riley was dismissed as a defendant from this litigation and appellee did not appeal that dismissal.

There is no evidence that appellant's, Bobby Motley, Colonel Sapp or Sgt. Martin ever said anything about crushing the car. The car was never crushed.

During the course of the investigation relative to the status of the Corvette, the Kentucky State Police attempted to locate the rightful owner of the stolen car. The Plaintiff, disregarded the KSP plan, and attempted to obtain a "speed title" for the Corvette knowing it to be stolen. During

appellee's attempt to obtain the "speed title" he unlawfully altered information on the title to reflect a different year and VIN number than was reflected on the original purchase title. The Department of Vehicle Regulation notified the Kentucky State Police of the apellee's attempts pursuant the mandatory requirements of KRS 186A. 255. These are actions that brought about his subsequent indictment and prosecution under KRS 186.990(1) and KRS 516.030.

Appellee's superiors with the Justice and Public Safety Cabinet became involved in supporting his claim to the car. Appellee was employed by the Cabinet. Lieutenant Governor Pence, head of the Justice Cabinet, his deputy, Cleve Gambill, and the general counsel, Luke Morgan, all supported appellee's claim. It is difficult to understand why they thought appellee could secure a title superior to State Farm. This intervention with the statutory duties of the Kentucky State Police was distracting until the Cabinet officials came to understand that the Kentucky State Police were conducting a criminal investigation. Cleve Gambill, Deputy Secretary, then wrote the Kentucky State Police and acknowledged that the criminal investigation should continue. Appendix III Gambrill Letter.

Appellee on several occasions contacted the Department of Vehicle Regulations and sought to obtain title to the vehicle. The Department refused, knowing that State Farm was in

the process of preparing an application for a salvage title. The Department believed that because the VIN had been altered that a salvage title was necessary. This would alert any subsequent buyer of the vehicle of the prior alteration and the fact that it was once a stolen vehicle.

Undeterred, the appellee decided to persuade Eva McDaniel, Jessamine County Clerk, to alter the title documents to show a corrected VIN and model for the car. He presented to her a confidential inspection report prepared by the Kentucky State Police. He secured this report through the efforts of Luke Morgan, general counsel for the Justice Cabinet. The title documents produced by clerk McDaniel did not show the salvage status of the title. Neither was Ms. McDaniel told by appellee that State Farm had a claim for title to the car.

The Department of Vehicle Regulation, being knowledgeable in this matter, refused to issue a title to appellee. It also triggered KRS 186A.255 which requires the Department to notify the Kentucky State Police where one attempts to title a stolen vehicle or supply false information about a title. This is when Appellant, Motley, first became involved. He was ordered by Appellant, Colonel Sapp, to investigate this case. Appellant Bobby Motley and Appellant, Sgt. Martin, commenced interviewing persons. Appellant, Bobby Motley interviewed Eva McDaniel, Jessamine County Clerk first. Sgt. Martin interviewed her on

two separate later occasions. The interviews are consistent in showing appellee brought the KSP confidential vehicle inspection report to her and represented that she could enter the information thereon and produce a corrected title in respondent's name and that appellee did not tell her that State Farm was claiming title to the car.

When the Department of Vehicle Regulation refused to accept the document and title the vehicle in appellee's name he threatened to sue the Department.

However, it is undisputed - he did not file a civil suit before he unlawfully attempted to secure a title though the clerk. It is this unlawful attempt to secure the title with the Jessamine County Clerk that is the subject of the indictment against the appellee.

The civil suit he later filed led to a Jessamine Circuit Court settlement where the seller of the car to appellee paid State Farm $4,000.00, and then State Farm transferred title to appellee. This happened shortly before the return of the indictment charging appellee with a crime for his attempt in securing title through Ms. McDaniel.

During the investigation, Appellants Martin and Motley interviewed numerous persons including Justice Cabinet officials who had supported appellee's claim to title.

An unusual situation arose when the investigating Kentucky State Police Officers went to see Larry Cleveland, Commonwealth Attorney of Franklin County, about the facts they had uncovered. Mr. Cleveland advised them that appellee and Luke Morgan, general counsel for the Justice Cabinet, had been to see him earlier in the day. Appellee had left a notebook supporting his actions. Mr. Cleveland gave the notebook to the appellants. It was apparent to appellant, Bobby Motley, and he believes to Colonel Sapp and Sgt. Martin, as well, that Mr. Cleveland had little interest in prosecuting the case. Mr. Cleveland then wrote a letter to the Attorney General asking that a special prosecutor be appointed because "a conflict exists." Appendix IV Cleveland Letter. The Attorney General contacted David Stengel, Commonwealth Attorney for Jefferson County, Kentucky, and then appointed him as special prosecutor in the case. It is interesting that there was a discussion between Commonwealth Attorney Stengel and the Attorney General that this case was a "hot potato" because Steve Pence was involved. RA2, Vol III, Stengel Deposition. It is also worthy of note that Steve Pence and Cleve Gambill came to see Commonwealth Attorney Stengel while he was considering the case to tell him that they had done nothing wrong. RA2, Vol III, Stengel Deposition.

Mr. Stengel and his first assistant, Thomas VanDeRostyne, investigated the case including meeting with Kentucky State

Police Officers. Appellant, Bobby Motley, was one of the officers. Special prosecutor Stengel, aided by his first assistant decided appellee had violated KRS 516.030, forgery in the second degree. There is no evidence showing appellant Motley, Colonel Sapp or Sgt. Martin had anything to do with selecting the statute of which Appellee was charged or for that matter whether or not Appellee would be charged with anything.

A grand jury was convened in Franklin County. Special prosecutor Stengel believes Commonwealth Attorney Cleveland assisted him in convening the grand jury. The grand jury heard witnesses presented by the special prosecutor. The grand jury found probable cause to exist and returned an indictment charging appellee with violating KRS 516.030, forgery in the second degree.

It appears prior to trial there were discovery disputes that were resolved by the trial judge. One of these disputes was when appellee's counsel contended he had not been given one of the McDaniel tape recorded interviews. It was then given to appellee's counsel and used by appellee at trial. A similar argument was made about a personal notebook of Colonel Sapp. It was produced to appellee's counsel and used by him at trial. It was the prosecutor who decided what discovery materials were producible to appellee's counsel before trial. The trial judge ruled on all evidentiary issues brought to his attention

including motions for judgment of acquittal. The trial judge permitted the case to be decided by the jury. The jury found the respondent not guilty.

PROCEDURAL HISTORY

After being acquitted on the criminal charges, appellee then brought this action alleging a state claim for malicious prosecution. Answers were filed and motions for summary judgment by all four defendants. The trial court heard all four motions and made rulings at the same hearing. One defendant, Detective Bill Riley was dismissed from the action when the trial court summarily granted his summary judgment motion.

Motions for summary judgments were filed by appellants Motley, Sapp and Martin contending that they were entitled to summary judgment because the appellee had failed to prove the first element of the tort of malicious prosecution and in the alternative they were entitled to the defense of qualified immunity. The trial judge summarily denied the motions without making any findings of fact or conclusion of law. Appellants appealed to the Court of Appeals. On May 20, 2011, the Court of Appeals in Martin v. O'Daniel, 2011 WL 1900165 (Ky. App. 2011) (2009-CA-001738-MR) affirmed the trial court's decision.

The Court of Appeals holding was two-fold. First, the court stated that "although we might agree with the appellants and might have held differently than the trial court on that

issue we cannot address it here", (Martin at p.9) because the trial court's finding on the issue of malicious prosecution was not before the court because it was not interlocutory. Second, the defense of qualified immunity was not available to the police officer because apellees's complaint was not based on allegations of negligence. The Court held that the defense of qualified immunity is only available in claims sounding in negligence.

The trial court then entered a scheduling Order and set a trial date. Before the trial, on April 2, 2012 the United States Supreme Court issued its opinion in Rehberg v. Paulk, 132 S. Cit 1497, 182 L. Ed. 2d 593(2012) establishing that absolute immunity of the prosecutor extends to law enforcement officers who merely investigate and do not arrest or issue a criminal complaint against a defendant. Because of the issuance of this opinion the trial court granted leave to continue discovery and submit renewed motions for summary judgment.

Following depositions of special prosecutor David Stengel and first assistant Thomas VanDeRostyne, establishing it was solely their decision to present the case to the grand jury, the appellants renewed their motions for summary judgment. The trial court granted a summary judgment to all appellants. RA2, Vol V, pp717-24, and Appendix II. The trial court, Special Judge Sheila Isaacs, found that appellee could not prove the

first element of malicious prosecution namely, initiation. Judge Isaacs also found appellant Motley was entitled to immunity for his participation in investigating and testifying under existing Kentucky law and Rehberg v. Paulk, _____ U.S. _____, 132 S. Ct. 1497, 182 L.Ed.2d 593 (2012).

Appellee appealed to the Court of Appeals of Kentucky. The Court of Appeals reversed and remanded, finding that the officers, including appellant, Bobby Motley, were not entitled to the defense of immunity under Rehberg because the claim was not a 42 USC 2983 claim and that the trial court erred in granting summary judgment dismissing appellee's malicious prosecution claim and remanded the case to the trial court to review the malicious prosecution claim under standards set forth in Sykes v. Anderson, 625 F.3d 294 (2010).

ARGUMENT

I. The Trial Court correctly reviewed the appellee's claim for malicious prosecution applying the elements set forth by the Kentucky Supreme Court in *Raine v. Draisin* .

The trial court properly analyzed the law and the facts in this action applying the standard of review set forth in Raine v. Draisin, 621 S.W.2d 895 (1981). The Court of Appeals does not assert that there are disputed questions of fact on the issue of initiation. Rather, they remanded the case to the trial court with specific instruction to review this

claim under the elements set forth in Sykes v Anderson 625 F3rd 294 (6th Cir 2010) a Federal 42 USC 1983 action. The only rationale for the ruling was because they found the reasoning persuasive in Phat's Bar & Grill v. Louisville County Metro Government, 918 F.Supp 2d 654(W.D. 2013). Which is yet another 42 USC 1983 action.

The state tort of malicious prosecution has been clearly defined for over thirty years. As such, Kentucky law is well settled and clear "…(T)he doctrine of malicious prosecution is an old one in our Commonwealth. See, for example, Holburn v. Neal, 34 Ky. 120, 4 Dana 120 (1836). Historically, it has not been favored in the law. Lexington Cab Co. v. Terrell, 282 Ky. 70, 137 S.W.2d 721 (1940). Public policy requires that all persons be able to freely resort to the courts for redress of a wrong, and the law should and does protect them when they commence a civil or criminal action in good faith and upon reasonable grounds. It is for this reason that one must **strictly** (emphasis added) comply with the prerequisites of maintaining an action for malicious prosecution. Davis v. Brady, 218 Ky. 384, 291 S.W. 412 (1927), Raine v. Drasin, 621 S.W.2d 895 (1981).

There are six (6) well defined elements necessary to the maintenance of an action for malicious prosecution in either civil or criminal cases. The elements are, (1) the institution or continuation of original judicial proceedings, either civil

or criminal, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding. Id. Raine at 899. In Kentucky a criminal charge can be instituted by *only* three mechanisms:

1) by arrest made by a sworn police officer or citizen (KRS 431.005, Rcr 6.02);
2) by filing of a criminal complaint made by a citizen with the county attorney where the crime occurred (RCr 2.02, RCr 6.02) or
3) by indictment returned by the grand jury (Ky Const sec. 12, RCr 6.02).

In order for appellant Motley to initiate a criminal proceeding against apellee only options 1 and 2 above are applicable. Appellant Motley could have either arrested appellee or filed a criminal complaint against him in order to initiate a prosecution. Herein neither happened because the sole decision to present this case to a grand jury rested with the special prosecutor, Hon David Stengel. RA2, Vol. III, pp 392-448, Stengel Deposition. Thus, appellant Motley can not be held responsible for initiating the charge and the claim for malicious prosecution must fail as a matter of law as the trial court correctly found. Appellee's argument that appellant Motley should be held responsible for malicious prosecution

because he influenced the prosecutor's decision to seek an indictment is not supported by the law or the uncontroverted facts. The trial court, after reviewing the entire record of the case, correctly opined that the sole decision to go forward with the prosecution of the appellee was made by the special prosecutor David Stengel "... He determined the crime to be charged, presented the case to the grand jury and prosecuted the case at trial after the indictment was returned." RA2 Vol V, pp 721-Summary Judgment pg 3. In reversing the trial court, the Court of Appeals appears to say that the trial court should reconsider the initiation element of the state malicious prosecution claim under a Federal case involving a 42 USC 1983 action namely, Sykes v. Anderson, 625 F.3d 294 (2010). The Court of Appeals appears to say that the state trial court must reconsider the element of initiation under Sykes instead of Raine v. Drasin. To require such would repudiate thirty plus years of Kentucky law by vitiating or changing the long held holding in Raine v. Drasin.

Interestingly, the Sykes Court stated "...the term "participated" should be construed to mean "aided", so that "to be liable for participating in the decision to prosecute, the officer must **participate in a way** (emphasis mine) that aids in the decision as opposed to passively or neutrally participating" Sykes at 309 n. 5. Even if you assume arguendo that a Sykes

analysis is the proper standard for determining whether or not appellant Motley or appellants Sapp or Martin participated in the decision to prosecute appellee, a review of the deposition testimony of the special prosecutor Dave Stengel clearly indicates that appellant's involvement in the investigation of the case against appellee did not rise to the level that they were "participants" in the decision to present the case to a grand jury. That decision was solely special prosecutor Stengel's. RA2, Vol. III, Stengle deposition.

As such, appellant Motley respectfully submits that the elements of the state tort of malicious prosecution are set forth in the Kentucky Supreme court's holding in Raine v. Drasin and the trial correctly applied the Raines holding in granting Summary Judgment.

II. THE TRIAL COURT CORRECTLY APPLIED THE UNITED STATES SUPREME COURT'S RULING IN REHBERG AND FOUND THAT APPELLANT MOTLEY IS ENTITLED TO ABSOLUTE OFFICIAL IMMUNITY FOR INVESTIGATING AND TESTIYING IN THE CRIMINAL TRIAL.

The trial court correctly interpreted the Rehberg decision, stating that it "clarified the law for the actions in investigating and testifying in a case that is directly submitted to a grand jury by a prosecutor and where the officer has not made and arrest or sworn a criminal complaint" and found that Sgt. Motley is also entitled to absolute official immunity.

Rehberg v. Paulk 132 S. Ct. 1497,182 L.Ed2d 593 (2012). RA2, Vol V pp719-24, Appendix II.

In *Rehberg*, the United States Supreme Court answered the long disputed question of what, if any, immunity is a law enforcement officer entitled to for actions in investigating and testifying in a case that is directly submitted to a grand jury by a prosecutor wherein the officer does not make an arrest or swear a criminal complaint. The Supreme Court ruled that the law enforcement officer is entitled to the same absolute immunity as the prosecutor who submitted the case to the grand jury. The Court extended this immunity to activities a law enforcement officer engages in to prepare the case for the prosecutor as well as testifying before the grand jury.

Specifically the Rehberg court stated"

> " By testifying before a grand jury, a law enforcement officer does not perform the function of applying for an arrest warrant; nor does such an officer make the critical decision to initiate a prosecution. It is of course true that a detective or case agent who has performed or supervised most of the investigative work in a case may serve as an important witness in the grand jury proceeding and may very much want the grand jury to return an indictment. But such a witness, unlike a complaining witness at common law, does not make the decision to press criminal charges.
>
> Instead, it is almost always a prosecutor who is responsible for the decision to present a case to a grand jury, ...It would thus be anomalous to permit a police officer who testifies before a

> grand jury to be sued for maliciously procuring an unjust prosecution when it is the prosecutor, who is shielded by absolute immunity, who is actually responsible for the decision to prosecute. See *Albright v. Oliver*, 510 U.S. 266,279, n. 5 (1994)(Ginsburg, J. concurring)(the prosecutor is the "principal player in carrying out a prosecution") see *ibid.* ("the star player is exonerated, but the supporting actor is not")." Id at 14,15.
>
> "This includes an claim that a witness conspired to initiate or maintain the prosecution...In the vast majority of cases involving a claim against a grand jury witness, the witness and the prosecutor conducting the investigation engage in preparatory activity such as preliminary discussion in which the witness relates the substance of his intend testimony. We decline to endorse a rule of absolute immunity that is so easily frustrated. Id at 12.

The ruling in Rehberg is wholly consistent with the existing common law in Kentucky. Raine v. Drasin, 621 S.W.2d 895 (1981). Although the Rehberg case was brought under a section 1983 claim the Court's analysis addresses the conduct that is entitled to immunity and holds that law enforcement officers are entitled to immunity for engaging in the investigation and testimony at the behest of a prosecutor when the officer does not arrest or file a criminal complaint. This holding envelopes the Kentucky common law requirements that a person "initiate" the claim to support the tort of malicious prosecution.

The trial court's finding that the appellee failed to prove the first element of malicious prosecution, the initiation or continuance by the appellant, Bobby Motley falls squarely with her additional finding that he is entitled to absolute official immunity for his prosecutor directed police investigative activities under Rehberg.

The undisputed fact is that the special prosecutor initiated and continued the criminal action against the appellee:

Q. When I say, "we," sir, I'm actually talking about you. Aren't you to make the decision to go forward because you were the boss?

A. Yes, my call with consultation with Tom Van DeRostyne is who I meant as "we." Not the troopers.

Q. Was there ever an occasion to where any of the state police officers insisted that this grand jury presentation go forward?

A. No, sir, they just wanted what they -- I think what they expressed to us is they wanted an independent eye to look at it because they did not like the reason that they got from Mr. Cleveland.

Q. In fact, no charges had been levied against Mr. O'Daniel, had they?

A. No.

RA2, Vol. III, pp.392-448.

Without question appellant Motley did not arrest or otherwise charge apellee with a crime.

With respect to "maintaining" of a criminal case, it is impossible for a police officer to so. Once the Franklin County Kentucky grand jury returned a felony indictment against the appellee, the prosecutor assigned to the case is charged with and had the sole discretion and authority to maintain the case, not police officers (KRS15.725).

The Court of Appeals in its decision asserts a strained interpretation of the United States Supreme Court ruling in Rehberg that disregards the well reasoned analysis of the Court. In the unique cases where a prosecutor directly submits a case to the grand jury and a police officer does not make an arrest or swear an criminal complaint the ruling in Rehberg requires that officer to be cloaked with the absolute immunity of the prosecutor for investigating and testifying. This rule of law applies to the conduct of the officer whether a claim against him be in tort or under 42 USC 1983.

The trial court, Special Judge Sheila Isaacs, specifically opined that "The Supreme Court goes on to address other privileged actions of law pertaining to conspiracies to initiate prosecution and general investigatory activities. " Citing Rehberg in support the trial Court provided:

"this rule may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness; testimony to support any other...claim concerning the initiation or maintenance of prosecution. Were it otherwise a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves...In the vast majority of cases involving a claim against a grand jury witness, the witness and the prosecutor engage in preparatory activity... We decline to endorse a rule of absolute immunity that is so easily frustrated." Rehberg at pg 12.(Summary Judgment pg 5.)

In this case, appellee's claim against appellant, Motley, is only premised upon conducting and presenting a criminal investigation to a Special Prosecutor, who in turn made the decision to seek an indictment from a Grand Jury.

If the Court of Appeals decision is not reversed, every criminal prosecution that results in dismissal or acquittal will subject law enforcement officers who have participated in the investigation to a malicious prosecution claim with no protection of immunity even if they have not arrested or sworn a criminal complaint.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court of Appeals decision be reversed and the trial court's summary judgment affirmed.

Respectfully submitted,

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